

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
APPENDIX**



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74-2213

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,  
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Appellee,  
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-against-  
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FRANK ATKINS,  
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:  
Appellant.  
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:  
:  
-----x

Docket No. 74-2213

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APPENDIX TO  
APPELLANT'S BRIEF

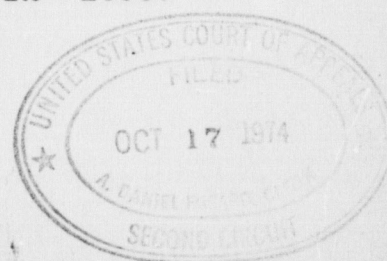
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ON APPEAL FROM A JUDGMENT  
OF THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

WILLIAM J. GALLAGHER, ESQ.,  
THE LEGAL AID SOCIETY,  
Attorney for Appellant  
FEDERAL DEFENDER SERVICES UNIT  
509 United States Court House  
Foley Square  
New York, New York 10007  
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,  
Of Counsel

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PAGINATION AS IN ORIGINAL COPY

JUDGE [REDACTED]

34. 6. 1915

[illegible]

6	ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
			DATE	NAME	RECEIVED	DISBURSED
	Fine,					
	Clerk,					
	Marshal,					
	Attorney,					
	Commissioner's Court, 13:495 & 2					
	Witnesses, 13:1708 & 2					
	25:5361(d) & (i) & 5871					
	Forgery, (ct1)					
	Possession of stolen mail (ct2)					
	Unlawful possession of Firearms (ct1)					

DATE	3 counts	PROCEEDINGS
7-3-74	Filed Indictment	
7-8-74	Deft. Kenneth Atkins appears, (no Atty.) Court directs a plea of Not Guilty be entered. 10 days for motions. Bail continued as previously fixed by the Magistrate at \$7,500 Cash. Deft. Remanded in Lieu of Bail. Ward, J.	
7-3-74	Deft. Frank Atkins appears. (Atty. Present). Deft. pleads Not Guilty. Bail continued as previously fixed by the Magistrate at \$7,500 Cash. Deft. Remanded in Lieu of Bail. Ward, J.	<i>W. E. Thompson</i> Deputy Clerk
7-22-74	FRANK ATKINS - Filed Notice of Motion returnable 8/5/74 at 10AM for an order to suppress certain evidence pursuant to Rule 41 FRCP	

DATE	Frank ATKINS-	PROCEEDINGS	CLERK'S FEES	
			PLAINTIFF	DEFENDANT
8- 7-74	Frank Atkins-	Filed Jeff's memorandum in support of motion to suppress		
8- 7-74	Frank Atkins-	Filed Government's memorandum in opposition to motion to suppress.		
8- 2-74	Frank Atkins-	deft. (Atty. present) withdraws his plea of not guilty and pleads guilty to count 1. P.S.I. ordered. Sentence 9-6-74 - Jail set by Magistrate continued - deft. remained in lieu of bail. Metzner, J.		
8- 5-74	Frank Atkins-	hearing on motion to suppress begun and concluded. No denial. JURY TRIAL begun before Metzner, J.		
8- 6-74	Frank Atkins-	trial continued.		
8- 7-74	Frank Atkins-	trial continued and concluded. Jury Verdict: Count 1 - GUILTY Count 2 - NOT GUILTY Count 3 - GUILTY. P.S.I. ordered - Sentence Sept. 4, 1974 - Defendant remanded. Metzner, J.		
8-8-74	Frank Atkins-	Filed appeal dated 7-8-74		
9-4-74	FRANK ATKINS -	FILED JUDGMENT (atty present) It is adjudged that the defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment of SIX (6) MONTH on count 1. Count 2 is dismissed on motion of defendant with the consent of the Government (copies issued) METZNER, J.		
9-4-74	FRANK ATKINS -	FILED (JUDGMENT) (atty present) It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ONE (1) YEAR on each of counts to 1 and 3 to concurrently with each other. METZNER, J. (copies issued)		
9-4-74		Filed Notice of Appeal to U.S.C.A 2nd Circuit from the final Judgment rendered on (a/o to U.S. Atty.: Mr. Frank Atkins)		
9/10/74		Transcript of record of proceedings, dated 8/5/74		
9/10/74		Transcript of record of proceedings, dated 8/5/74; 8/6/74		

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v-

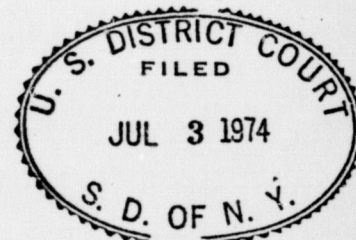
KENNETH ATKINS and  
FRANK ATKINS,

Defendants .

74 CRIM. 663

INDICTMENT

74 Cr.



The Grand Jury charges:

COUNT ONE

On or about the 25th day of June, 1974,

in the Southern District of New York

KENNETH ATKINS and FRANK ATKINS,

the defendants, unlawfully, wilfully and knowingly and with intent to defraud the United States, uttered and published as true and caused to be uttered and published as true, a false, forged and counterfeited writing, namely, the endorsement of the payee on a check, knowing the same to be false, forged and counterfeited, the check being a genuine obligation of the United States, and of the following tenor:

Check No.: 73,233,217  
Symbol: 3104  
Dated: June 12, 1974  
Payee: Robert M. Smith  
Amount: \$1,221.87

(Title 18, United States Code, Sections 495 and 2.)

COUNT TWO

The Grand Jury further charges:

On or about the 25th day of June, 1974,  
in the Southern District of New York,  
KENNETH ATKINS and FRANK ATKINS,

the defendants , did unlawfully, wilfully and  
knowingly have in their possession the contents  
of a certain letter addressed to:

Robert M. Smith  
820 Thieriot Avenue  
Bronx, New York

which had been stolen, taken, embezzled and  
abstracted from and out of a mail depository

knowing the same to have been stolen, taken,  
embezzled and abstracted.

(Title 18, United States Code, Sections 1708 and 2.)

COUNT THREE

The Grand Jury further charges:

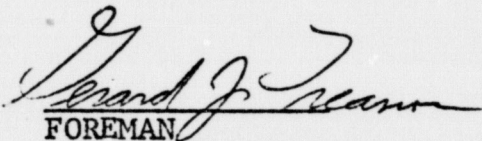
On or about the 25th day of June, 1974,

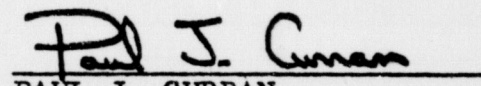
in the Southern District of New York, FRANK ATKINS, the defendant, unlawfully, wilfully and knowingly did possess a firearm, to wit, a .38 caliber pen gun, which firearm

(i) was not registered to him in the National Firearms Registration and Transfer Record as required by Title 26, United States Code, Section 5861(d); and

(ii) was not identified by a serial number as required by Title 26, United States Code, Section 5861(i).

(Title 26, United States Code, Sections 5861(d) and (i) and 5871.)

  
FOREMAN

  
PAUL J. CURRAN  
United States Attorney



(DANIEL BELLER, AUSA)

Sept. 4, 1974

*d* Frank Atkins sentenced (Atty Larry S. Greenberg present) to ONE (1) YEAR on each of counts 1 and 3 to run concurrently with each other at a place of confinement to be designated by the Attorney General of the U.S. REMAND  
METZNER, J.

Deft. advised of rights to appeal.

*d* Kenneth Atkins sentenced (Atty Gary Sunden present) to SIX (6) MONTHS on count 1 at a place of confinement to be designated by the Attorney General of the U.S. ~~Remanded~~. Remanded. METZNER, J.

Count 2 is dismissed on motion of defendant's counsel with the consent of the Government. METZNER, J.

*MDU*

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**United States District Court**

**SOUTHERN DISTRICT OF NEW YORK**

**THE UNITED STATES OF AMERICA**

**vs.**

**KENNETH ATKINS and  
FRANK ATKINS,**

**Defendants.**

**INDICTMENT**

**74 Cr.**

**(18 USC §§ 495 & 2; 26 USC  
§§5861(d) and (i) and 5871)**

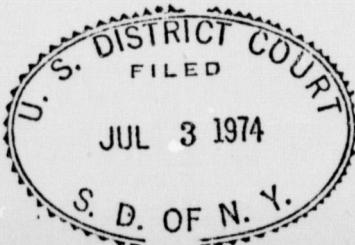
**PAUL J. CURRAN**

*United States Attorney.*

**TRUE BILL**

*Foreman.*

**FPI-SS-2-19-71-20M-6950**



**JUL 8 1974**

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he en*

*Case*

*Co't*

*Magistrate*

*Memo*

**JUL 8 1974**

*(atty*

*Ref't*

*preca*

*at \$50*

*in Lieu*

A. Left Court 7/11/77  
Court directs a plea of N/g  
tured. 10 days for motions  
assigned to Fectner, J. Bail  
as previously fixed by the  
Court at \$7500 Cash. Left  
in lieu of Bail Ward, J.

Left Frank Atkins appears  
Mr. Guezel Legal Aid present)  
leaves N/g. Bail Court as  
previously fixed by the Judge at  
\$7500 Cash. Left remanded  
of Bail M. R. Ward, J.

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(over)

AUG 2 1974

The defendant Kenneth Atkins with his  
att'y present withdraws his plea of not guilty  
and pleads guilty to count One (1).

Plea accepted.

Presentence report ordered

Sentence Sept. 4, 1974

Bail conditions as set by magistrate are  
continued.

Defendant remanded in lieu of bail.

W. J. [Signature]

AUG 5 1974

(Motion to Suppress) ~~hearing~~ hearing as to Frank Atkins <sup>and co.</sup> ~~begun~~  
Motion denied.

Jury impanelled and sworn. Trial begun as to Frank Atkins.

CHARLES M. METZNER

AUG 6 1974

Trial continued as to Frank Atkins

AUG 7 1974

CHARLES M. METZNER

Trial continued as to Frank Atkins.

Trial concluded. Defendant Guilty on ct. 1  
Not Guilty on ct. 2  
Guilty on ct. 3

Jury polled.

Presentence report ordered. Sentencing Sept. 4, 1974

Defendant remanded

CHARLES M. METZNER

SP

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US v Atkins 1  
8/6/74  
74 Cr. 663 2  
(Metzner, J.)

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THE COURT: Madam Forelady, ladies and gentlemen of the jury:

We have now reached the point in this trial where you are about to enter upon your final function as jurors which is, of course, one of the sacred duties of citizenship. You have given careful attention to the evidence during the course of the trial, and I am certain that you will conduct your deliberations in the same fine spirit that you have so far displayed and with impartiality and fairness reach a just verdict in this case.

In our court system the functions of the Judge and the functions of the jury are clearly defined. It is my duty to instruct you as to what the law is; it is your duty to accept the law as I state it to you. Just as I am the exclusive judge of the law, so you are the exclusive judges of the facts.

You alone determine the credibility of the witnesses, and the weight, effect and value that should be given to their testimony. It is up to you to determine from the evidence which you have heard what the facts are in this case, and from those facts decide whether the defendant has violated the law.

This is a criminal prosecution in which the Government is one party and the defendant is the other.

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2       The fact that the Government is a party entitles it to  
3       no greater and to no lesser consideration than any other  
4       party.     It is entitled to the same consideration as given to  
5       the defendant, no more and no less.

6               This case must be decided within the scope of  
7       the charges against the defendant as contained in the  
8       indictment, but before discussing the law applicable to the  
9       charges of the indictment, let us consider some general  
10      principles which apply to every criminal case.

11             An indictment itself is not evidence.     It  
12      merely describes the charges made against a defendant and  
13      may not be considered by you as evidence of the guilt of  
14      a defendant.     Nor can the fact that a grand jury has  
15      found this indictment in any way detract from the presump-  
16      tion of innocence with which the law surrounds a defendant  
17      unless and until his guilt is proved beyond a reasonable  
18      doubt.

19             You have heard testimony that Kenneth Atkins  
20      has pleaded guilty to a portion of the charges contained  
21      in this indictment.     I must caution you that his plea of  
22      guilty should not be considered by you in any way in  
23      passing upon the guilt or innocence of the defendant now  
24      on trial.     The guilt or innocence of Frank Atkins should  
25      be determined by you solely from the evidence that has

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2       been presented to you on this trial.

3               Each of the three counts which you will consider  
4       alleges the commission of a separate and distinct offense.  
5       It will be necessary for you to reach a verdict of guilty  
6       or not guilty as to each count of the indictment.    You must  
7       consider and weigh the evidence separately as to each  
8       count.    The fact that you may find the defendant guilty  
9       or not guilty of one of the offenses charged should not  
10      control or influence your verdict with respect to any other  
11      offense of which the defendant is charged.

12             The defendant has denied the charges in the  
13      indictment.    By his plea of not guilty the defendant has  
14      put into issue every material fact alleged in the accusa-  
15      tions brought against him.    Accordingly, the Government,  
16      having made the charge, has the burden of proving beyond a  
17      reasonable doubt each material element of the indictment.  
18      This burden of proof never shifts.    It remains with the  
19      Government throughout the entire trial and during your  
20      deliberations as jurors.

21             A defendant does not have to prove his innocence.  
22      He is presumed to be innocent, and this presumption is over-  
23      come only when you reach a conclusion from the evidence  
24      that his guilt has been established beyond a reasonable  
25      doubt.

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2               Now, what is meant by a reasonable doubt?  
3       There is nothing mysterious about the term.     It means,  
4       as the words themselves indicate, a doubt based upon  
5       reason and common sense which arises after consideration  
6       of all the evidence.     Reasonable doubt is a doubt which  
7       would cause reasonable persons to hesitate to act in  
8       matters of importance to themselves.     It is not a vague,  
9       speculative, imaginary something, and a person may not be  
10       convicted on mere suspicion or conjecture.     On the other  
11       hand, a reasonable doubt does not exist merely because a  
12       juror does not wish to perform an unpleasant duty.

13               A reasonable doubt may arise not only from the  
14       evidence produced, but also from a lack of evidence.

15               A defendant may also rely upon evidence brought  
16       out on cross-examination of any of the witnesses who have  
17       testified on behalf of the Government.     This is so because  
18       the law does not impose upon a defendant a duty to produce  
19       any evidence.

20               It is not necessary for the Government to prove  
21       the guilt of a defendant beyond any possible doubt.  
22       Proof is usually not a matter of mathematical or absolute  
23       certainty.     In the nature of things it cannot be.  
24       But to sustain a conviction there must be such proof as  
25       satisfies your reason as intelligent people, beyond any

reasonable doubt, that the defendant is guilty as charged.

If you do not have a reasonable doubt of the defendant's guilt as to the material elements of a charge, then you should return a verdict of guilty on that count. If, on the other hand, you do have a reasonable doubt as to the defendant's guilt as to any of the material elements of the crime charged, then you must return a verdict of not guilty as to that count.

If the evidence is susceptible of two interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant and the other to his innocence, it is your duty under the law to adopt that interpretation or conclusion which will admit of the defendant's innocence and reject that which points to his guilt.

This trial has been a short one and you have just heard the summations of counsel, in which they pointed out the various portions of the proof on which they say you should rely to render a verdict in favor of their client. I see no reason to further detail the contentions of the parties or the specific proof to substantiate those contentions.

The first count in the indictment charges the defendant with violation of Section 495 of Title 18, United

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2       States Code.       This section makes it a crime for any  
3       person knowingly and wilfully to utter or publish as true  
4       any false, forged or counterfeited writing with intent to  
5       defraud the United States, knowing the writing to be false,  
6       forged or counterfeited.

7               In this count it is charged that on or about  
8       June 25th, 1974, the defendant unlawfully, wilfully,  
9       knowingly and with intent to defraud the United States,  
10      uttered and published as true and caused to be uttered and  
11      published as true a United States Treasury check dated June  
12      12, 1974, in the amount of \$1221.87, which check contained  
13      the forged endorsement of Robert M. Smith and that the  
14      defendant knew that the endorsement of the payee was  
15      forged.

16             In order for you to return a verdict of guilty  
17      against the defendant on this count you must be convinced  
18      that each of the following three elements has been proved  
19      beyond a reasonable doubt:

20             First, that the endorsement of the payee,  
21      Robert M. Smith, which appears on the check, is a forgery.

22             Second, that on or about June 25, 1974, the  
23      defendant offered the check for cashing knowing that the  
24      endorsement was a forgery.

25             Third, that the defendant did so with intent to

defraud the United States.

Now, as to the first element, to forge a signature is to sign the name of another without that person's authorization or consent. In this case Kenneth Atkins has admitted that he signed the name of Robert M. Smith on the back of the check. He did so without Smith's authorization or consent.

The second element which must be proved beyond a reasonable doubt is that the defendant uttered and published the check knowing that the endorsement was a forgery. The phrase "utter and publish" includes offering a check to be cashed. Kenneth Atkins has admitted that he tried to cash this check. The guilt of the defendant Frank Atkins on this count depends on your finding that he aided and abetted Kenneth and I will discuss this with you in a few moments.

It is not necessary that you find that the defendant personally forged the endorsement. You need only find that he knew the endorsement was a forgery.

The third element which must be proved beyond a reasonable doubt is that the defendant attempted to cash the check with intent to defraud the United States. The evidence need not establish that the United States or anyone else was actually defrauded but only that the

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2       defendant acted wilfully and with an intent to defraud  
3       when he offered the check to be cashed.       Here again the  
4       defendant is charged with aiding and abetting his brother  
5       in his admitted intent to defraud the United States.

6               You may find that the defendant acted knowingly  
7       and wilfully if he acted voluntarily and purposely and  
8       with specific intent to do something which the law forbids.  
9       That is to say, that he must have acted with evil motive  
10      or bad purpose to disobey or to disregard the law, and not  
11      because of negligence, mistake, inadvertence or other  
12      innocent reason. .

13             It is obviously impossible to ascertain or prove  
14      directly what a person knew or intended.       You cannot look  
15      into a person's mind and see what his intentions were or  
16      what he knew.       But a careful and intelligent consider-  
17      ation of the facts and circumstances shown by the evidence  
18      in any given case, as to a person's actions and statements,  
19      enables us to infer with a reasonable degree of certainty  
20      and accuracy what his intentions were in doing or not  
21      doing certain things, and the state of his knowledge.

22             Count 2 charges the defendant with a violation  
23      of Section 1708 of Title 18, United States Code.       This  
24      section makes it a crime for any person to have in his  
25      possession any letter or contents of a letter which has

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2       been stolen or taken from a letterbox or authorized  
3       depository for mail matter, knowing the same to have been  
4       so stolen or taken.

5               In this count it is charged that on or about  
6       June 25, 1974 the defendant unlawfully, wilfully and  
7       knowingly had in his possession the contents of a letter  
8       addressed to Robert M. Smith, 820 Thieriot Avenue, Bronx,  
9       New York, which letter had been stolen or taken from an  
10      authorized depository for mail, and that he knew the same  
11      to have been so stolen or taken.

12             In order for you to return a verdict of guilty  
13      against the defendant as to this count in the indictment  
14      you must be convinced that each of the following four  
15      elements has been proved beyond a reasonable doubt:

16             First, that on or about June 25, 1974, the  
17      defendant knowingly and wilfully had in his possession the  
18      contents of the letter addressed to Robert M. Smith;

19             Second, that the letter and its contents had  
20      been deposited in and sent through the mails;

21             Third, that the letter and its contents had been  
22      stolen or taken from the Smith letterbox; and,

23             Fourth, that at the time of his possession, the  
24      defendant knew that the letter and its contents had been  
25      taken or stolen.

As to the first element, here again Kenneth Atkins admits that he had possession of the check that was in a letter addressed to Robert M. Smith.

As to the second element, the defendant has conceded that the Treasury check in question was deposited and sent through the mails.

As to the third element, a letter has been stolen when it has been taken unlawfully, wilfully and knowingly without the permission of the owner or addressee, from the mailbox and with the intention of permanently depriving the owner or addressee of the rights and benefits of ownership of the letter.

The Government need not prove that the defendant personally stole or took the letter.

If the possession was merely innocent, unaccompanied by knowledge that the letter had been stolen, then the defendant has not violated the law. Taking a letter lying on top of the mailbox as described by the defendant and his brother is not a violation of the section of the law charged by the Government in this indictment.

As to the fourth element, if you find beyond a reasonable doubt that the defendant had the contents of the letter in question in his possession and that the letter had been stolen only shortly before the defendant

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2       possessed its contents, the law permits you, but does not  
3       compel you, to infer that the defendant knew the letter  
4       was stolen.     You are free to draw the inference if you  
5       feel the evidence warrants it.

6                 What I have previously said about the terms.....  
7       knowingly and wilfully applies to this count as well.

8                 Here again it is the Government's contention that  
9       the defendant under Count 2 aided and abetted his brother  
10      Kenneth Atkins in the commission of the crime charged.

11                The guilt of the defendant on Counts         2  
12      may be established without proof that he himself       actually  
13      did every act constituting the offense.     This is so  
14      because anyone who knowingly aids, abets, counsels, induces  
15      or procures the commission of a crime against the United  
16      States is punishable as a principal.

17                In order for the defendant to aid or abet  
18      another to commit a crime, it is necessary that he wilfully  
19      associate himself in some way with the criminal venture,  
20      knowing the essential elements of the offenses as I have  
21      outlined them for you and that he wilfully participated in  
22      it as something that he wishes to bring about, that he  
23      wilfully seeks by some action of his to make it succeed.

24                Similarly, whatever a person is legally capable  
25      of doing himself can be done through another as agent.

And thus if the accused wilfully caused an act to be done by another person which is an offense against the United States, the accused is punishable as a principal.

Mere presence and guilty knowledge on the part of a defendant that a crime is being committed is not sufficient unless you are also convinced beyond a reasonable doubt that the defendant was doing something to forward the crime - that he was a participant rather than merely knowing spectator.

The third and last count in the indictment charges the defendant alone with a violation of Section 5861 of Title 26, United States Code. This section makes it a crime for any person to have in his possession a firearm which was not registered to him in the National Firearms Registration & Transfer Record or identified by a serial number.

In this count it is charged that on or about June 25, 1974, the defendant unlawfully, wilfully and knowingly did possess a 38-caliber pen gun which was not registered to him in the National Firearms Registration & Transfer Record and was not identified by a serial number.

In order for you to return a verdict of guilty against the defendant on this count in the indictment, you must be convinced that each of the following three elements

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2       has been proven beyond a reasonable doubt:

3               First, that the 38-caliber pen gun described in  
4       Count 3 is a firearm within the definition of the statute;

5               Second, that on or about June 25, 1974, the  
6       defendant knowingly and wilfully possessed the 38-caliber  
7       pen gun; and

8               Third, that either the pen gun was not regis-  
9       tered to the defendant in the National Firearms Registration  
10      & Transfer record or that the pen gun was not identified by  
11      a serial number.

12              As to the first element, you may find that the  
13      38-caliber pen gun described in this count is a firearm  
14      within the definition of the statute if you find beyond a  
15      reasonable doubt that it is a weapon or device capable  
16      of being concealed on the person from which a shot can be  
17      discharged through the energy of an explosive.

18              As to the second element you may find that the  
19      defendant possessed the pen gun if you find beyond a  
20      reasonable doubt that he had direct physical control over  
21      it at any given time.     What I have said previously about  
22      the terms knowingly and wilfully also applies to this  
23      count.

24              As to the third element, you must be satisfied  
25      beyond a reasonable doubt that the pen gun was not regis-

tered in the name of Frank Atkins in the National Firearms Registration Record or that the pen gun was not identified by a serial number as required by law.

The Government need not have proven both of these acts in order for you to find this third element, it need only prove one.

It is ~~not~~ required that the defendant specifically knew that the pen gun was unregistered and that it did not have a serial number.

In determining the guilt or innocence of a defendant, you must decide that question solely from the evidence you have heard from the witness stand and the exhibits that have been placed before you.

The summations of counsel which you have heard are not to be considered as evidence, but only as arguments to you as to what counsel feel you should find from the evidence.

If, during the course of the trial, the Court sustained an objection by one counsel to a question asked by the examining counsel, you are to disregard the question and any alleged facts contained in the question, and you may not speculate as to what the answer would have been.

Now, there are, generally speaking, two types of evidence from which a jury may properly find the truth as

to the facts of a case. One is direct evidence, such as the testimony of an eyewitness. The other is indirect or circumstantial evidence, which is the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

Circumstantial evidence is the proof of facts from which you may reasonably infer a material element of the crime.

Let us take one simple example to illustrate what is meant by circumstantial evidence. We will assume that when you entered the Court House this morning the sun was shining brightly outside, and it was a clear day. There was no rain. Now, assume that in this courtroom the blinds are drawn and the drapes are drawn, so that you cannot look outside. Assume as you are sitting in this jury box, and despite the fact that it was dry when you entered the building, someone walks in with an umbrella dripping water, followed in a short time by a man wearing a raincoat which is wet.

If you are asked whether it is raining now, you cannot say that you know it directly of your own observation. But certainly upon the combination of facts which I have stated to you, even though when you entered the building it was not raining outside, it would be reasonable and logical

1 ars

2 for you to conclude that it is raining now.

3 That is about all there is to circumstantial  
4 evidence. You may draw such inferences as reason and  
5 common sense lead you to draw from facts which you find to  
6 have been proven. Great care must be exercised when  
7 drawing inferences from circumstances proved in criminal  
8 cases, and mere suspicions will not warrant a conviction.

9 However, no greater degree of certainty is  
10 required of circumstantial evidence than is required of  
11 direct evidence. It is not on any different or lower  
12 plane than direct evidence. The law simply requires that  
13 in either case you must be convinced beyond a reasonable  
14 doubt of the guilt of a defendant.

15 In your search for the truth, you must use plain  
16 every-day common sense. You must not be governed by  
17 sympathy, bias or prejudice. You have seen the witnesses  
18 on the stand and observed their manner of giving testimony  
19 when I refer to witnesses I, of course, include the  
20 defendant who has testified here.

21 How did the witnesses impress you? Did they  
22 appear to be testifying frankly, candidly and fairly?  
23 In determining what degree of credit you should give a  
24 witness' testimony, you may consider his conduct, his  
25 manner of testifying, and his interest in the outcome of

1       ars

2       the trial.

3               You should also consider his relationship to  
4       the Government or the defendant, his bias or impartiality,  
5       and any motive he may have to testify falsely.     It does  
6       not necessarily follow, of course, that because a person is  
7       interested in the result he is incapable of telling a truth-  
8       ful version of an occurrence.

9               The defendant has testified in this case.  
10       A defendant who wishes to testify is a competent witness  
11       and his testimony is to be judged in the same way as that  
12       of any other witness.

13              If you believe that a witness wilfully testified  
14       falsely to any material fact, you may disregard his testi-  
15       mony altogether or you may accept that part of his testimony  
16       which you believe worthy of credence.     What you accept or  
17       reject as credible evidence is for you to determine, but you  
18       may not go outside the evidence to speculate as to the  
19       facts.

20              The quality of the testimony of the particular  
21       witnesses, regardless of who calls them, rather than the  
22       quantity of witnesses, is the test to be used in arriving  
23       at your decision.     There is no presumption that the  
24       witnesses for the Government are more or less truthful or  
25       credible than the witnesses for the defendant.

Evidence that a witness has been convicted of a crime may only be considered by you in assessing his credibility as a witness and the weight you will give to his testimony.

You should consider a witness' entire testimony, his direct examination, his cross-examination and his redirect examination. You should consider the strength or weakness of his recollection in the light of all the testimony and attendant circumstances in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses may or may not cause you to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently. Innocent misrecollection, like failure of recollection, is not an unusual experience. In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or to an unimportant detail, and whether the discrepancy results from innocent error or wilfull falsehood.

You may call for any exhibits which you desire to see in conjunction with your deliberations. You may call for a reading of any portion of the official transcript of the evidence, or any portion of this charge.

You are instructed that the question of possible

1 punishment of a defendant in the event of conviction is no  
2 concern of the jury and should not, in any sense, enter  
3 into or influence your deliberations. The duty of impos-  
4 ing sentence in the event of conviction rests exclusively  
5 upon the Court. The function of the jury is to weigh  
6 the evidence in the case and determine the guilt or inno-  
7 cence of a defendant solely upon the basis of such evi-  
8 dence.  
9

10 I have sought to avoid any comments which might  
11 suggest that I have personal views on the evidence, or  
12 that I have any opinion as to the guilt or innocence of  
13 the defendant, and you are not to assume that I have any  
14 such views or opinion. This charge is given to you solely  
15 to instruct you as to the law applicable to this case.

16 The actions of the Judge during the trial in  
17 granting or denying motions or ruling on objections by  
18 counsel, or in statements to counsel, or in attempting to  
19 clearly set forth the law in these instructions, are not  
20 to be taken by you as any indication of any determination  
21 of the issues of fact. These matters, the actions of  
22 the Court, relate to procedure and law. You, the members  
23 of the jury, determine the facts.

24 There are 12 members on this jury and all of you  
25 must agree upon any verdict you reach as to the defendant

on any count in the indictment.

This case is obviously an important one to the defendant. It is equally important to the Government. I am submitting it to you in complete confidence that you will comply with your oath as jurors and decide the case fairly and impartially, and without fear or favor.

Are there any exceptions to the charge?  
If so I will take them in the robing room.

MR. GREENBERG: No exceptions.

THE COURT: Swear the marshals.

(Two marshals sworn by the clerk.)

THE COURT: Ladies and gentlemen of the jury, I have instructed the marshals to take you to lunch before you start your deliberations so you may go back to the jury room and the marshals will take you for lunch and then return for your deliberations.

(The jury left the courtroom.)

MR. GREENBERG: Your Honor, for the record, should the jury request a copy of the indictment or any of the exhibits, I have no objection.

THE COURT: You can work it out with Mr. Beller.

(Jury recessed for lunch from 1.00 p.m.  
until 2.15 p.m.)

- - -

(Jury returned to the courtroom at 3.00 p.m.)

THE COURT: Ladies and gentlemen, you sent a communication to the Court which reads as follows:

"Jury request a copy of the Judge's charge for each indictment."

I assume you mean each charge in the indictment.

"Or have the element for the first indictment", and there again I assume you want me to read the charge.

You want me to read the whole thing? I don't think that is what you mean. If I read the first count is that sufficient or do you want all of them?

JUROR NO. 8: Well, Madam Forelady, could I speak for you? We had agreed that we would like --

THE COURT: Wait, be careful in what you say. Just tell me what you want me to read.

JUROR NO. 8: We want copies of the elements which are associated with each of the charges that you read to us this morning.

THE COURT: I will read it again to you. We do not have it transcribed.

JUROR NO. 8: Your Honor, may I say another thing?

THE COURT: I would rather not. We run great risks when conversation takes place between the jury and the

Judge in front of everybody. You can tell me what you want to do and I will listen. I will now read to you the elements of each charge in the indictment, there are three charges and I will read them again.

(Charge reread as requested.)

THE COURT: That completes the reading to you of the three counts in this indictment.

You may retire.

(Jury left the courtroom at 3.10 p.m.)

(Jury note was marked as Court Exhibit 2.)

(The following took place at 4.30 p.m.)

THE COURT: The jury wishes to see the raincoat and the gun. They also request to hear the testimony of Inspector Jones when it was said the gun was loaded and concerning the whereabouts of the raincoat.

I assume that goes to Jones' testimony.

They also want Frank's testimony when he realized he had the weapon.

(The jury returned to the courtroom at 4.35 p.m.)

THE COURT: Ladies and gentlemen of the jury, you have sent a communication to the Court which reads as follows:

"Jury wishes to see the raincoat and the gun.

We also wish to hear the testimony of Inspector Jones

when it was said the gun is loaded and concerning the whereabouts of the raincoat."

We assume you speak about the whereabouts of the raincoat, where the raincoat was in the Post Office while he was being interrogated.

THE FORELADY: Yes.

THE COURT: Lastly you want to have "Frank's testimony when he realized he had a weapon."

(Testimony read as requested.)

THE COURT: You may retire and deliberate.

(Jury left the courtroom at 4.50 p.m.)

(The following took place in the robing room at 5.25 p.m.)

THE COURT: I will send a note as follows:

"If you don't feel you can reach a verdict by 6 o'clock I will allow you to go home and return tomorrow morning."

I will put it in that fashion.

Is that all right with you?

MR. GREENBERG: That is fine.

THE COURT: "Members of the jury: If you are of the opinion that you cannot reach a verdict in this case by 6.00 p.m. I will excuse You for the night and you will return tomorrow morning to continue your deliberations."

Is that all right with you, Mr. Greenberg?

MR. GREENBERG: Yes, your Honor.

THE COURT: Mr. Beller?

MR. BELLER: Yes, it is, your Honor.

THE COURT: All right, give this to them.

(Pause.)

THE COURT: I have this answer:

"We cannot reach a verdict and we would like to return in the morning."

All right, that was fast.

Bring them in.

(The following took place in open court at 5.35 p.m., jury present.)

THE COURT: Ladies and gentlemen, you have indicated in response to the Court's inquiry that you cannot reach a verdict before 6 o'clock. Consequently, I will allow you to go home tonight and return tomorrow morning at 10 o'clock to continue your deliberations.

This is, of course, not the usual procedure. Normally the jury are kept together as you know for dinner and deliberate through the night and are sent to a hotel overnight.

However, I think in this case there is no chance of any juror being tampered with.

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2               However, I do want to caution you that you are  
3 not to talk to anyone about what you are deliberating on in  
4 the jury room.     Don't let anybody ask you and I know your  
5 wives and husbands may be curious as to what is going on  
6 but you are just going to have to tell them that they will  
7 have to wait until the case is decided before you will even  
8 discuss it.     Please don't bother you.     Watch the base-  
9 ball game on television tonight.

10              This is the only condition on which I can let  
11 you go home because you realize the jury is supposed to be  
12 kept together once the case is submitted to you for deter-  
13 mination.

14              Secondly, please be here promptly at 10 o'clock  
15 so you can resume your deliberations.     See you tomorrow  
16 morning.

17              (Jury notes were marked as Court Exhibits

18              3 and 4.)

19              THE COURT: I would appreciate it if nobody  
20 leaves the courtroom for about ten minutes to give the  
21 jury time to go downstairs and get out of the building  
22 before anyone identified with the case leaves.

23              (Adjourned to Wednesday, August 7, 1974 at  
24 10.00 o'clock a.m.)

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2       UNITED STATES OF AMERICA

3               vs.

74 Cr. 663

4       FRANK ATKINS.

5       -----

6  
7                       New York, August 7, 1974;  
8                       10.00 o'clock a.m.

9               (Trial continued.)

10               --

11               (Jury returned to the courtroom at 10.50 a.m.)

12               THE COURT: Madam Forelady, and ladies and  
13 gentlemen of the jury, you have sent a note to the Court  
14 which reads as follows ,

15               "Jury requests simulated shell as was found  
16 in the gun."

17               Well, there is no simulated shell in evidence  
18 and you are only entitled to look at documents and things  
19 in evidence.     We can't send you any simulate shell and,  
20 of course, we will not send the real shell to you except  
21 we will exhibit to you again here in the courtroom if you  
22 wish to look at it.

23               Do you have it?

24               MR. BELLER:     Yes.     One is the blank and one  
25 is live.

THE COURT: Let me see them.

(Handed to Court.)

THE COURT: This is Government's Exhibit 7 which I assume was the live bullet found in the gun. Pass it among the jurors.

(Handed to jury.)

THE COURT: The bullet was admitted by the defendant to have been in the barrel.

You have asked for "Clarification of the statement on or about."

All indictments do not specifically give the exact date when an occurrence takes place. It is permissible for the grand jury to charge that on or about a certain date an act took place and the variance between that date is what you think is a reasonable time to be included within the words on or about.

For example, it is perfectly possible for on or about to mean one day or a week or two weeks or three weeks. It is up to you to determine what is a reasonable time within the specific date put in the indictment. In this case the evidence is that the check was offered for cashing on June 25 and both the Government and the defense admits that is when it happened.

The check was taken on or about the 14th I think

it was of June, depending on Mrs. Smith's testimony and the testimony of Kenneth Atkins as to when he took it. He says he took it from the top of the mailbox.

It is up to you to determine what is encompassed by the word "on or about" and what is reasonable to assume.

You may retire and resume your deliberations.

(Jury left the courtroom at 10.55 a.m.)

(Jury note was marked as Court Exhibit 5.)

(Jury returned to the courtroom at 11.35 a.m.)

THE CLERK: Ladies and gentlemen, please answer as your name is called.

(Jury roll called - all present.)

THE CLERK: Madam Forelady, have you agreed upon a verdict?

THE FORELADY: Yes, we have.

THE CLERK: How do you find the defendant Frank Atkins as to Count 1?

THE FORELADY: Guilty.

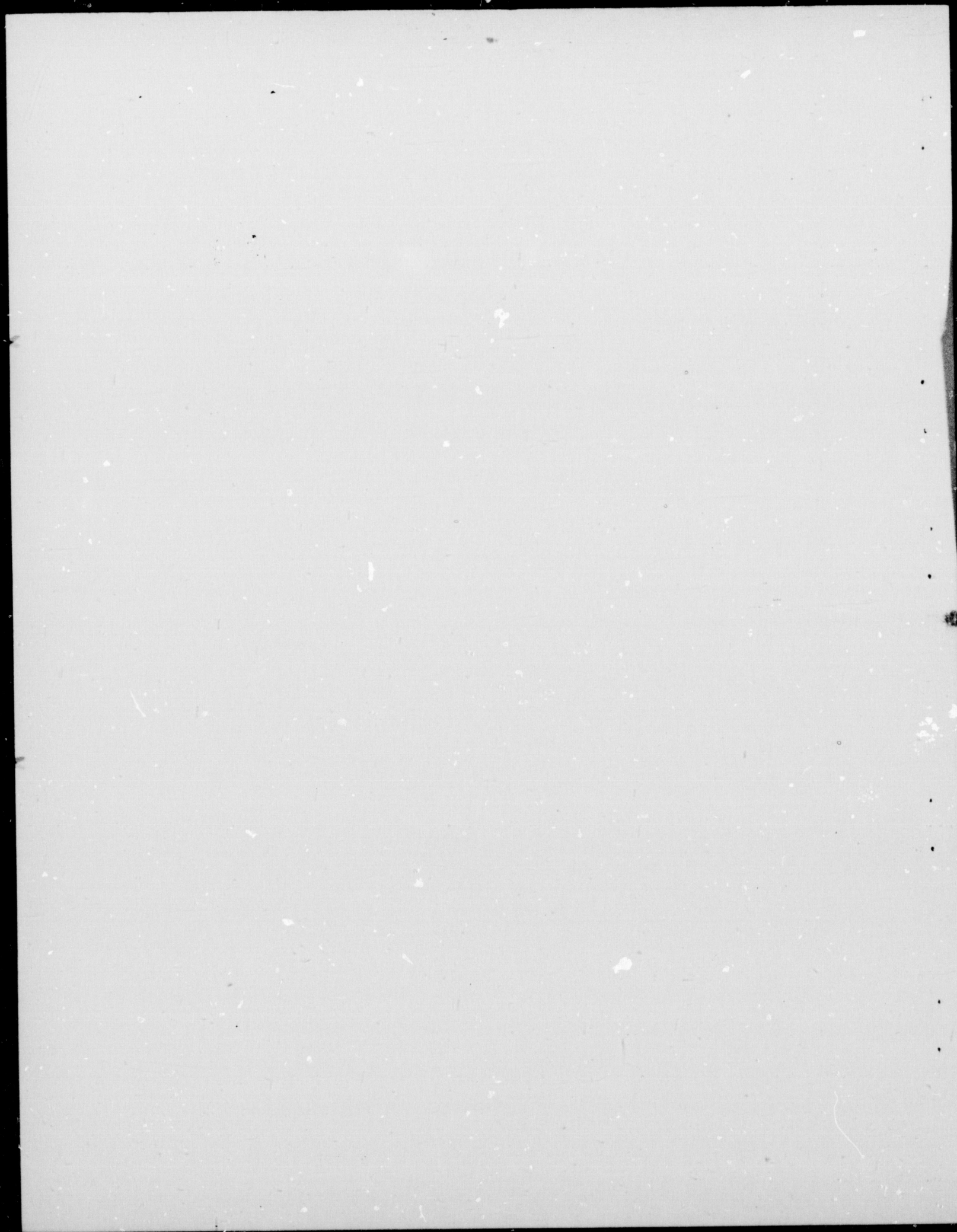
THE CLERK: How do you find as to Count 2?

THE FORELADY: Not guilty

THE CLERK: How do you find as to Count 3?

THE FORELADY: Guilty.

THE CLERK: Ladies and gentlemen of the jury, you say you find the defendant Frank Atkins guilty as to



Certificate of Service

October 16, 1974

I certify that a copy of this brief and appendix has been personally served on the office of the United States Attorney for the Southern District of New York.

*Phyllis M. Rosenberg*